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11 *[Proposed] counsel for Roland Kiser and Klaus Bernhart, the*
12 *responsible officers of the Debtor*

13 **UNITED STATES BANKRUPTCY COURT**

14 **DISTRICT OF NEVADA**

15 In re:

16 MARTIFER AURORA SOLAR, LLC a
17 Nevada limited liability company,

18 Affects Martifer Aurora Solar, LLC
19 Affects Martifer Solar USA, Inc.
20 X Affects all Debtors

21 Debtors.

Case No.: BK-S-14-10355-abl and
BK-S-14-10357-abl

Jointly administered under
Case No.: BK-S-14-10355-abl

Chapter 11

**STATEMENT OF CONCERNS OF
ROLAND KISER AND KLAUS
BERNHART, RESPONSIBLE OFFICERS
OF THE DEBTOR, WITH REGARD TO
EMPLOYMENT OF FTI CONSULTING**

DATE: OST REQ. FOR MARCH 10, 2014

TIME: OST REQ. FOR 9:30 a.m.

22 Roland Kiser and Klaus Bernhart, the responsible officers (the “Officers”) of the
23 Debtors in Possession Martifer Solar USA, Inc. (“Debtor”) and Martifer Aurora Solar, LLC
24 (“Aurora” and, together with Debtor, Debtors”) in the above-captioned bankruptcy
25 proceeding hereby express their concerns regarding the proposed employment of FTI
26 Consulting (“FTI”).

27 1. Funding. Officers have requested that the DIP Lender verify that it will fund
28

1 amounts due to FTI in addition to amounts required pursuant to the approved cash collateral
2 budget.

3 2. Transaction Fee. The terms of the FTI employment include (1) hourly rate
4 compensation up to \$100,000 per month; (2) a “success fee” of \$275,000 if the Debtor
5 restructures via a confirmed Plan of Reorganization or consummates a sale (or sales) of a majority of
6 its assets within the first 3 months of its employment with the Success Fee increasing by \$75,000 if
7 between the end of months 3 and 4 plus \$50,000 if between the end of months 4 and 5 and an
8 additional \$25,000 per month thereafter; (3) a “Transaction Fee” of 3.0% of the aggregate value of
9 each Transaction, subject to a minimum aggregate fee of \$400,000 (with 50% of any monthly, non-
10 refundable fees paid for the Financial Advisory Services credited against any Transaction Fee); (4) a
11 “Tail Fee” of 1.5% of the value of any Transactions which involve a party identified during the time
12 of FTI’s employment, and (5) a post-effective date fee of \$25,000 per month. Officers have
13 requested that FTI waive any “Transaction Fee” with respect to a transaction involving
14 BayWa r.e. Renewable Energy (“BayWa”), which has executed a letter of intent for a
15 purchase in the \$9.5 - \$12 million range. To date, FTI has declined this request.
16

17 3. Duties of Officers. Officers are the responsible parties appointed by the
18 Court. As such, they retain the responsibility to act on behalf of the Debtor. The Board,
19 controlled by the Debtor’s parent and DIP Lender, has passed a resolution that would require
20 officers to report to FTI, a directive that Officers believe is inappropriate and in derogation of
21 their duties to the Debtor. The Court appointed Officers as “the natural persons responsible
22 for the duties and obligations of the Debtor in this Chapter 11 Case” (Doc. No. 90). The
23 court has the authority to appoint such a responsible person to “perform the duties of the
24 Debtor-in-Possession under the Code and ... conduct the affairs of the business” even to the
25 exclusion of the Debtor’s board of directors. Matter of FSC Corp., 38 B.R. 346, 347 (Bankr.
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1 W.D. Pa. 1983). Here, such appointment is particularly crucial given the potential conflicts
 2 of interest between the Debtor's parent/DIP Lender, which controls the Debtor's board of
 3 directors; and the interest of the Debtor in maximizing the return to all creditors.

4 The Bankruptcy Code authorizes the bankruptcy court to "issue any order,
 5 process, or judgment that is necessary or appropriate to carry out the
 6 provisions of this title." 11 U.S.C. § 105(a). Further, it states that the rights
 7 and powers of a debtor in possession are subject "to such limitations or
 conditions as the court prescribes." 11 U.S.C. § 1107(a).

8 Matter of Gaslight Club, Inc., 782 F.2d 767, 770 (7th Cir. 1986). "[T]he shareholders' right to
 9 control a Chapter 11 debtor-in-possession is not without limitations under the Bankruptcy
 10 Code. Section 1107(a) specifically provides that a debtor-in-possession shall have all (or
 11 almost all) of the rights, powers and duties of a trustee subject '*to such limitations or*
 12 *conditions as the court prescribes ...*'. Matter of Lifeguard Indus., Inc., 37 B.R. 3, 17
 13 (Bankr. S.D. Ohio 1983). "[T]he court has considerable authority to interfere with the
 14 management of a debtor corporation in order to protect the creditors' interests." Matter of
 15 Gaslight Club, Inc., 782 F.2d 767, 770 (7th Cir. 1986). Compare In re Boileau, 736 F.2d 503,
 16 506 (9th Cir. 1984)("debtor-in-possession has no power except such as the court may allow"
 17 (citation omitted)); In re Real Estate Partners, Inc., SA 07-13239 TA, 2007 WL 7025114
 18 (Bankr. C.D. Cal. Nov. 20, 2007) aff'd, SA CV 07-1440 ODW, 2009 WL 3246619 (C.D. Cal.
 19 Oct. 5, 2009)("former management would have no continuing role and that ... responsible
 20 person would only be answerable to the Court.").

23 Complicating the situation is the fact that Officers' employment contracts expire on
 24 March 10, 2014, thereafter, employment is "at will" unless an agreeable extension is
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1 executed.¹ Counsel for the DIP lender has advised Officers that, based in part on their
2 reluctance to abdicate their duties as responsible persons, their employment will terminate on
3 March 10. However, so long as they are the designated responsible persons for these
4 Debtors, Officers will continue to utilize their independent judgment with regard to their
5 roles as CEO, CFO, and responsible officers.

6 Respectfully submitted this 7th day of March, 2014.
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28 ¹ However, Section 6(a) of the employment contracts require a thirty-day written notice of
termination, which has not been given.